

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

X : AMERICAN BROADCASTING COMPANIES, INC. ET AL.,

: Plaintiffs,

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: JAN 28 2013

12 Civ. 1540 (AJN)

-v-

ORDER

AEREO, INC.,

: Defendant,

X

WNET ET AL.,

: Plaintiffs,

12 Civ. 1543

-v-

AEREO, INC.,

: Defendant,

X

ALISON J. NATHAN, District Judge:

The Court has received the attached letters requesting an extension or stay of the current February 22, 2013, deadline for fact discovery in the above-captioned case. The renewed request for a stay of discovery is denied. The Court neither grants nor denies the extension at this time, but hereby ORDERS that the parties appear for a conference at 4:00 PM on February 8, 2013.

At that conference, the Court will consider the extension, taking into account: (i) what discovery has been produced; (ii) what discovery remains to be produced; and (iii) what disputes, if any, the parties or the Court must resolve in order for discovery to be completed.

To that end, the Court ORDERS that each party submit, by 5:00 PM on February 1, 2013, a letter detailing the most up-to-date responses to the three previously listed queries.

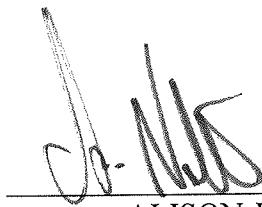
Specifically, each party should describe, as of the date of its letter: (i) what materials it has

produced; (ii) what requested materials -- contested and uncontested -- it has not produced (except that the parties are not requested to provide further information regarding the contested privilege logs, which the Court will address at the conference); and (iii) what specific disputes, if any, the parties or the Court must resolve in order for discovery to be completed, as well as an estimated timeline for production of the disputed materials following a ruling by the Court.

The parties should be prepared to discuss these letters at the February 8, 2013, conference and to update the Court on what additional steps they have made, between the date of the letter and the date of the conference, to press forward with the discovery process (e.g., additional discovery that has been produced or disputes that have been resolved). The Court's willingness to extend the discovery deadline for a particular party will be dependent on that party's ability to demonstrate its diligence and good faith efforts to complete discovery thus far.

SO ORDERED:

Dated: January 28, 2013
New York, New York



ALISON J. NATHAN
United States District Judge

CHICAGO LOS ANGELES NEW YORK WASHINGTON, DC

JENNER & BLOCK LLP

January 16, 2013

Julie A. Shepard
Tel 213 239-2207
Fax 213 239-2217
jshepard@jenner.com

VIA EMAIL
(NathanNYSDChambers@nysd.uscourts.gov)

The Honorable Alison J. Nathan
United States District Judge
U.S. District Court for the Southern District of New York
500 Pearl Street, Room 615
New York, NY 10007

Re: WNET, et al., v. Aereo, Inc., No. 12-Civ.1540-AJN (S.D.N.Y.) (Consolidated)

Dear Judge Nathan:

The WNET Plaintiffs write to request an extension of the fact discovery cutoff from February 22, 2013 to May 15, 2013. This request is necessitated by Aereo's untimely production of documents which has made it impossible for the Plaintiffs to complete discovery by February 22 without jeopardizing Plaintiffs' ability to adequately prepare their case. Plaintiffs' counsel has discussed this extension with Aereo's counsel several times in recent weeks. As reflected in the attached email from Aereo's counsel, Aereo acknowledges that a continuance is warranted, but Aereo claims that it cannot determine the precise date to which the cutoff should be extended until Aereo has a better understanding of what documents Plaintiffs will be producing in an attempt to resolve pending disputes over Aereo's 92 document requests and when those documents will be produced. Plaintiffs believe the proposed May 15 date will enable both sides to complete discovery. Further, it is important to have an understanding now of what the new cutoff will be to facilitate scheduling depositions and other case management matters.

It is already abundantly clear that fact discovery cannot be completed by February 22 despite Plaintiffs' diligent efforts to do so. Plaintiffs will be severely prejudiced if an extension is not granted while Aereo, which is not subject to an injunction and which has recently announced massive expansion plans and \$38 million in new financing, cannot claim any prejudice from the brief extension requested.

As detailed below, additional time is necessary because, among other things:

- Aereo's production of documents, which were due in October, remains incomplete even though there has never been any dispute as to Aereo's obligation to produce key categories of documents.
- Aereo's delays have prevented Plaintiffs from taking substantive depositions.
- The parties are in the midst of resolving disputes as to Aereo's 92 document requests to Plaintiffs which Aereo did not serve until approximately six weeks

The Honorable Alison J. Nathan
 United States District Judge
 January 16, 2013
 Page 2

- after discovery was reopened. Resolution of these disputes will result in Plaintiffs producing numerous additional documents to Aereo.
- There are other disputes regarding certain requests that Aereo has refused to respond to even after extensive meet and confer efforts by Plaintiffs. Those disputes will be presented to this Court in the near future, which will, in all likelihood, necessitate further discovery.

The reason this request is being filed at this time is because until recently Plaintiffs, based upon Aereo's representations, believed that discovery could be completed by February 22. Specifically, following the Court's September 21 scheduling order, Plaintiffs promptly served their document requests on September 24. Aereo's responses were due October 29. Although Aereo did not produce a single responsive email until December 7, Aereo represented that its production would be substantially complete by December 21. As detailed below, that was not the case. However, because Aereo has been producing some documents on a periodic basis and making such representations, Plaintiffs have refrained from burdening the Court with a motion to compel. Whether deliberately or not, Aereo has staged its production of documents so that the bulk of its production – and some of the more crucial categories of documents – have been delayed until just recently, with some significant categories still outstanding. Specifically, on January 14, 2013, Aereo produced over 27,000 documents totaling over 250,000 pages. This single production almost doubled the number of non-source code documents Aereo has produced since discovery was re-opened. And, its production remains incomplete. Plaintiffs are devoting extensive attorney resources, but the review and analysis of the late-produced documents will require at least two or three more weeks. And, only then can substantive depositions be taken.

Aereo's Delays In Responding To Undisputed Discovery. As noted above, Aereo's responses were due on October 29. Aereo did not produce documents on this date, but did agree to produce documents responsive to a number of Plaintiffs' discovery requests. After being confronted with Aereo's lack of production of any emails and non-source code documents, Aereo committed to Plaintiffs in early December that Aereo would complete its production of emails and attachments by December 21 and voluntarily offered to provide an index of Aereo's other electronic documents housed in Google Docs and Arena. But it was not until January 7, 2013, that Aereo even produced emails sent after August 6, 2012. Aereo's email production remains incomplete.

On January 4, Aereo announced it would not provide the promised index of electronic documents, only the electronic documents themselves. Aereo only commenced its production of those documents on January 14, and its production appears to be incomplete.

With respect to technical documents required for further testing of Aereo's antenna boards and subscriber data related to Plaintiffs' reproduction claims, Aereo initially produced only updated source code, some low level engineering documents, and data (in a non-native and difficult-to-use format). While such documents are important, Aereo resisted producing any meaningful higher level engineering documents, forcing Plaintiffs to conduct an ESI deposition of Aereo's head of technology just to confirm the existence and location of such higher level documents. Since the ESI deposition, Aereo has provided additional critical documentation. However, Aereo is only now completing the production of these documents.

Indeed, Aereo's January 14 production included portions of Aereo's wiki (a document repository used by Aereo's employees). Aereo has conceded that this wiki is a resource used by Aereo and contains critical information about Aereo's development, powering and operation of

The Honorable Alison J. Nathan
United States District Judge
January 16, 2013
Page 3

the antennas. But, Aereo despite multiple promises regarding its production, did not produce any sections of the wiki until January 14, 2013.

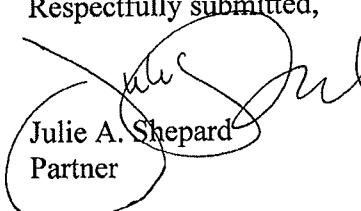
Aereo's failure to complete its production of documents in a timely manner – documents that even Aereo conceded were relevant and responsive – has prevented Plaintiffs from taking depositions and has substantially delayed Plaintiffs' ability to complete fact discovery prior to the February 22 deadline. For example, Plaintiffs had to cancel the deposition of Joseph Lipowski noticed for mid-December because Aereo failed to produce a single responsive email until December 7. And, as Aereo's production has remained largely incomplete as demonstrated by its production of over 27,000 documents on January 14, Plaintiffs have been reluctant to schedule further depositions until Aereo represents that its production is substantially complete.

Discovery Disputed By Aereo. After Plaintiffs' extensive meet and confer efforts to narrow the issues in dispute regarding seven document requests that Aereo either refused to respond to entirely or tried to sidestep with inappropriate limitations, the parties whittled those issues down to four categories. Those issues will shortly be presented to the Court and, in view of the fact that they could lead to additional discovery, are yet another impediment to the parties' ability to complete fact discovery by February 22.¹

Plaintiffs' Discovery Responses to Aereo Are Subject to Ongoing Meet and Confer Efforts And Will Result In Additional Documents Being Produced. In contrast to the 24 focused document requests served by Plaintiffs in September, Aereo served 92 broad document requests in November. The parties are in the midst of resolving disputes as to Aereo's 92 overbroad document requests to Plaintiffs which will result in Plaintiffs producing some additional documents to Aereo and then Aereo, presumably, will need additional time to review those documents and then take depositions relating to them. Inexplicably, as discussed above, Aereo is using the existence of this dispute as a justification for its refusal to mutually agree upon an extension of the fact discovery cutoff.

For all of these reasons, the February 22, 2013 fact discovery cutoff is no longer feasible. Accordingly, Plaintiffs respectfully request that the Court extend the fact discovery cutoff to May 15, 2013.

Respectfully submitted,


Julie A. Shepard
Partner

cc: All Counsel of Record

Attachment

¹ Plaintiffs have also served several third party subpoenas that are in dispute. The subpoenaed documents largely relate to Plaintiffs' reproduction claims and market harm. Plaintiffs would be materially disadvantaged by conducting key depositions of Aereo without these documents.

Shepard, Julie A.

From: David Hosp [Hosp@fr.com]
Sent: Tuesday, January 15, 2013 2:28 PM
To: Shepard, Julie A.; Spitzer, Seth E.; 'bpkeller@debevoise.com'; 'mpotenza@debevoise.com'; 'jinsleypruitt@debevoise.com'; 'mbharris@debevoise.com'; Klein, Kenneth D.; Fabrizio, Steven B; Stone, Richard L.; Wilkens, Scott B; Friedman, Joshua N.; Glickstein, Ethan A.
Cc: Elkin, Michael S.; Golinveaux, Jennifer A.; Lane, Thomas Patrick; Mark Puzella; Salazar Garcia, Jessica C.; Chan, Yvonne W; Michael, Erin M
Subject: RE: ABC et al. v. Aereo, Inc., 12-cv-1540-AJN; WNET et al. v. Aereo, Inc., 12-cv-1543-AJN

Ken:

This email responds to your phone call regarding an extension of the discovery schedule. We agree that an adjustment to the schedule may be appropriate, but, as I have indicated previously, we do not have the ability to determine the appropriate timing until we find out what Plaintiffs will produce in discovery and when. As you are aware, Plaintiffs initially responded to Aereo's discovery requests with numerous blanket objections and refusals to produce documents, and to date have produced virtually nothing of use. As a result, Aereo has already had to put off numerous noticed depositions. Late last night, WNET Plaintiffs backed off several of their unsustainable blanket objections, and agreed to provide additional documents (though there are still broad categories of documents that WNET Plaintiffs are refusing to produce without justification). You have given us no idea when even these limited additional documents will actually be produced. WABC Plaintiffs have not notified us that they will alter their stance from their initial blanket refusals, and we must assume they stand by their original positions.

As we have repeatedly indicated, we need to get the issues regarding the scope of the Plaintiffs' productions before the judge. In the interests of avoiding unnecessary motion practice and attempting to reach a resolution to these matters without Court intervention, we have (at your express demand) delayed bringing the issues to the Court for nearly a month. Your demand for an extension and threat to file a request with the Court in the absence of a near-immediate agreement, notwithstanding a complete lack of understanding on the scope of Plaintiffs' production, seems unnecessary and contrived. We hope that you will reconsider and allow the parties to come to reasonable understanding of an appropriate schedule based on complete information regarding core discovery matters. If not, please include this email along with your submission, and we will respond as appropriate.

Best,

Dave Hosp

This email message is for the sole use of the intended recipient(s) and may contain confidential and privileged information. Any unauthorized use or disclosure is prohibited. If you are not the intended recipient, please contact the sender by reply email and destroy all copies of the original message.

IRS CIRCULAR 230 DISCLOSURE: Any U.S. tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.(FR08-i203d)

DEBEVOISE & PLIMPTON LLP

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January 16, 2012

BY E-MAIL

Hon. Alison J. Nathan
United States District Judge
Southern District of New York
500 Pearl Street, Rm. 615
New York, New York 10007

**American Broadcasting Companies, Inc. et al. v. Aereo, Inc.,
12 CV 1540 (S.D.N.Y.) (AJN)**

Dear Judge Nathan:

The ABC Plaintiffs agree with the central point made in the WNET Plaintiffs' January 16, 2013 letter: Fact discovery cannot be completed in the next five weeks. They continue to believe, however, that it makes much more sense for the Court to stay this matter until May 15, 2013, rather than extend the current fact discovery deadline until that date.

As the Court may recall, at the September 19, 2012 conference, the ABC Plaintiffs expressed their view, given the Second Circuit's expedited treatment of the appeal in this matter, that it made more sense to defer the costs and burdens of discovery until after the Second Circuit ruled. 9/19/12 Tr. 14:19-16:13. The Court's decision not to adopt that approach was driven, in large part, by what was, at that time, complete uncertainty as to how long it might be before (a) argument was held and (b) a decision issued. *Id.* 14:12-18; 47:19-22.

Part of that uncertainty has been eliminated since September. On October 4, 2012 (almost a month before briefing of the appeal even had been completed), the Second Circuit underscored its decision to treat the appeal expeditiously by setting November 30, 2012 as the argument date. 12-2807-cv, 2d Cir., Dkt. 141. (A copy of the transcript of that argument is attached.) It also is worth noting that in the somewhat similar *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275 (2d Cir. 2012) matter, the Second Circuit issued its decision 89 days after argument – in a non-expedited appeal. Moreover, Judges Chin and Droney, two members of the *ivi* panel, also heard the appeal in this matter, along with Judge Gleeson of the Eastern District of New York. Finally, the Second Circuit's docket shows this Panel already has ruled in three other matters argued that day. Summary Order, *Woodard v. Shanley*, No. 12-361-pr, 2012 WL 6176756 (2d Cir. Dec. 12, 2012); Summary Order, *United States v. Alhakk*, No. 12-155-cr, 2012 WL 6176742 (2d Cir. Dec. 12, 2012); Summary Order, *United States v. Marimon*, No. 11-4921-cr, 2012 WL 6720523 (2d Cir. Dec. 28, 2012).

Hon. Alison J. Nathan

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January 16, 2013

Regardless of the exact date by which the Second Circuit rules, there is no disputing its decision – however it comes out – will shape the scope of discovery in this case – perhaps eliminating the need for it entirely. For the reasons set forth in your decision, *American Broadcasting Companies, Inc. v. Aereo, Inc.*, 874 F. Supp. 2d 373, 397-402 (S.D.N.Y. 2012), all of the Plaintiffs still continue to suffer irreparable harm. Nonetheless, the ABC Plaintiffs do not believe that, at this point, a 120-day stay until May 15, 2013 will seriously exacerbate the harm suffered to date. Despite claiming it will expand nationwide, Aereo continues to retransmit broadcast television programs from New York City stations only.

In addition to these practical reasons for a short stay of this action until May 15, 2013, there is the additional benefit of avoiding the contentious back and forth on the merits of the discovery disputes that have arisen. The ABC Plaintiffs completely agree with the WNET Plaintiffs that Aereo appears to have adopted a strategy of seeking to penalize Plaintiffs for having sought to protect their copyrights with overly broad and burdensome requests. One example of its unprecedented and extraordinarily burdensome approach was Aereo's insistence on a privilege log that would have required logging of even purely internal communications of *any* outside counsel who *ever* has represented *any* of the Plaintiffs or provided advice or analysis with respect to "Aereo and/or similar technologies (e.g., RS-DVRs, TiVo, DVRs, etc)." 1/11/13 Order, 12 Civ. 1540, Dkt. 158, at 3 (noting such a requirement would be "immensely burdensome"). Another is its 92 post-preliminary injunction document requests. By contrast, the two groups of Plaintiffs, pre- and post-preliminary injunction combined, have requested altogether about only two dozen different categories of documents. The WNET Plaintiffs' letter dated January 16 catalogues the other discovery issues in detail, and, of course, Aereo has its own views on the matter. A short stay avoids the need for the Court to sort through these disputes and allows time for the Second Circuit to rule and guide the scope of further discovery, if any, as this matter proceeds.

Respectfully submitted,


Bruce P. Keller

cc: All Counsel of Record

Attachment

In The Matter Of:

WNET, THIRTEEN, et al.

v.

AEREO, INC., F/K/A BAMBOOM LABS, INC.

HEARING - Vol. 1

November 30, 2012

MERRILL CORPORATION

LegalLink, Inc.

179 Lincoln Street
Suite 401
Boston, MA 02110
Phone: 617.542.0039
Fax: 617.542.2119

Page 1

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x

WNET, THIRTEEN, FOX TELEVISION
STATIONS, INC., TWENTIETH CENTURY FOX
FILM CORPORATION, WPIX, INC., UNIVISION
TELEVISION GROUP, INC., THE UNIVISION
NETWORK LIMITED PARTNERSHIP, AND PUBLIC
BROADCASTING SERVICE,

Plaintiffs-Counter-Defendants-
Appellants,

v.

12-12786-cv

AEREO, INC., F/K/A BAMBOOM LABS, INC.

Defendant-Counter-Claimant-Appellee.

-----x

AMERICAN BROADCASTING COMPANIES, INC.,
DISNEY ENTERPRISES, INC., CBS
BROADCASTING INC., CBS STUDIOS INC.,
NBCUNIVERSAL MEDIA, LLC, NBC STUDIOS,
LLC, UNIVERSAL NETWORK TELEVISION, LLC,
TELEMUNDO NETWORK GROUP, LLC AND
WNJU-TV BROADCASTING, LLC,

Plaintiffs-Counter-Defendants-
Appellants,

v.

12-2807-cv

AEREO, INC.,

Defendant-Counter-Claimant-Appellee.

-----x

November 30, 2012

500 Pearl Street
New York, New York

HEARING - 11/30/2012

Page 2	Page 4
1 2 3 4 B E F O R E: 5 JUDGE DENNIS CHIN 6 JUDGE CHRISTOPHER DRONEY 7 JUDGE JOHN GLEESON 8 9 10 ERIC J. FINZ, Hearing Reporter 11 12 13 14 15 P A R T I E S: 16 PAUL M. SMITH, ESQ. 17 BRUCE P. KELLER, ESQ. 18 R. DAVID HOSP, ESQ. 19 20 21 22 23 24 25	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25
Page 3	Page 5
1 PROCEEDINGS 2 JUDGE CHIN: We have sitting 3 with us again today Judge Gleeson 4 from the Eastern District of New 5 York, and we are grateful for his 6 assistance. 7 I understand that everyone is 8 here. Accordingly, we'll hear the 9 first cases in tandem. 10 MR. SMITH: Good morning, your 11 Honors, I'm Paul Smith, 12 representing the WNET appellants in 13 this case. 14 Congress in the 1976 Copyright 15 Act overruled the Supreme Court and 16 provided services that retransmits 17 broadcast television programs to 18 subscribers is engaging in public 19 performance of those programs and 20 needs a license to retransmit. 21 Aereo is a business that 22 receives and retransmits broadcast 23 television programming over the 24 internet to its subscribers for a 25 fee. It nevertheless claims to be	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25

2 (Pages 2 to 5)

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HEARING - 11/30/2012

<p style="text-align: right;">Page 6</p> <p>1 PROCEEDINGS 2 on that single transmission from 3 the personalized copy to the 4 subscriber, to the individual 5 subscriber assigned to that copy, 6 that that could be viewed as a 7 private transmission rather than a 8 public transmission, or private 9 performance rather than a public 10 performance.</p> <p>11 But that case is different 12 from this one because what you're 13 dealing with here is an entirely 14 unlicensed service, so everything 15 Aero does is unlicensed, from the 16 moment it receives the programming 17 over its antennas, the 18 transmissions it makes from its 19 antennas to its servers, where the 20 programming is processed into 21 internet format.</p> <p>22 JUDGE DRONEY: How does that 23 matter whether it's a public 24 performance or not?</p> <p>25 MR. SMITH: Your Honor, once</p>	<p style="text-align: right;">Page 8</p> <p>1 PROCEEDINGS 2 about. 3 After all, there was no issue 4 about the other transmissions that 5 were being made by Cablevision or 6 their receipt of the broadcast 7 programming or anything else, it 8 was just focused on that last 9 transmission.</p> <p>10 And so the effect of allowing 11 Cablevision to morph into a 12 decision that authorizes what Aero 13 does of course would be to mean 14 that everybody can engage in 15 license-free retransmission. 16 Because in current technology, it's 17 virtually cost-free to put these 18 copies of the stream and therefore 19 there would be a whole regime of 20 how television is delivered to 21 people over cable, over satellite, 22 with retransmission consent, with 23 license fees that are paid, that 24 whole thing --</p> <p>25 JUDGE CHIN: What about the</p>
<p style="text-align: right;">Page 7</p> <p>1 PROCEEDINGS 2 you start looking at the entire 3 service and everything it does, 4 including the servers that all the 5 subscribers share, the antennas 6 that are used, the wires over which 7 the signal goes before there is 8 even a copy made, then I think the 9 picture looks very different.</p> <p>10 And the fact that at some 11 point in that process they 12 interpose a copy and then send it 13 on doesn't mean that their entire 14 service becomes a private 15 transmission.</p> <p>16 JUDGE DRONEY: How does the 17 fact of a license matter?</p> <p>18 MR. SMITH: Well, the license 19 was what confined the attention of 20 the Cablevision panel just to the 21 final end of the transmission.</p> <p>22 JUDGE DRONEY: Is that the 23 basis for its decision?</p> <p>24 MR. SMITH: I think it is.</p> <p>25 That's what they were talking</p>	<p style="text-align: right;">Page 9</p> <p>1 PROCEEDINGS 2 argument that Aero is simply just 3 providing the equipment that 4 arguably as a technological matter 5 you could take these little 6 antennas and put them on to your 7 home computer and accomplish the 8 same thing, would that make it 9 closer to Cablevision?</p> <p>10 MR. SMITH: Your Honor, the 11 notion that you can be a service 12 that serves multiple people and 13 provide some access to distant 14 programming like this and still say 15 all you are is an equipment 16 provider, that argument first was 17 overruled by Congress.</p> <p>18 That's essentially what the 19 cable companies argued in 20 Fortnightly and in Teleprompter, 21 that they were just facilitating 22 the subscribers' receipt of 23 television over antennas, and that 24 they were not themselves engaged in 25 any kind of performance.</p>

3 (Pages 6 to 9)

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HEARING - 11/30/2012

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<p>1 PROCEEDINGS 2 And the Congress said no, you 3 are not, you're a service that is 4 performing the shows, when you take 5 it in on your antenna and send it 6 on. 7 And the fact that there are 8 individual antennas can't change 9 that analysis. First of all, in 10 the Transmit Clause Congress was as 11 broad as it possibly could be, said 12 any device or process that involves 13 transmitting programs on to 14 subscribers.</p> <p>15 JUDGE DRONEY: How about the 16 unique copies, isn't each recipient 17 of the Aereo service getting a 18 unique copy?</p> <p>19 MR. SMITH: There is a copy 20 that's created in the stream of 21 transmission.</p> <p>22 JUDGE DRONEY: For each 23 individual; right?</p> <p>24 MR. SMITH: Yes, that's the 25 legal issue we're presented with,</p>	<p>1 PROCEEDINGS 2 and send it on, including live, 3 effectively, so that the copy isn't 4 even perceptible to the user, well, 5 that's a very different 6 proposition. It takes Cablevision 7 and turns it into a complete carte 8 blanche for people to abuse the 9 copyright.</p> <p>10 JUDGE GLEESON: Are you 11 familiar with the device called the 12 Slingbox?</p> <p>13 MR. SMITH: I am, your Honor, 14 yes.</p> <p>15 JUDGE GLEESON: Now, if I were 16 able to afford one, it would allow 17 me to be able to take a broadcast 18 and convert it something on my 19 laptop.</p> <p>20 MR. SMITH: It would allow you 21 to take a broadcast and send it on 22 to the internet to one of your 23 devices, yes.</p> <p>24 JUDGE GLEESON: That wouldn't 25 be a public performance, my viewing</p>
Page 11	Page 13
<p>1 PROCEEDINGS 2 whether that can change the 3 analysis.</p> <p>4 As a practical matter what 5 that would mean if it does change 6 the analysis is that Congress's 7 determination in 1976 is overruled; 8 there will be no more licensing of 9 retransmission services because 10 everyone will start doing it.</p> <p>11 JUDGE DRONEY: Wasn't that the 12 basis of the Cablevision decision, 13 that each was a unique copy 14 thereto?</p> <p>15 MR. SMITH: In that particular 16 context where all they were 17 focusing on was that one 18 transmission from that copy that 19 had been created adjunct to a 20 licensed service. But if you're 21 going to allow them to do 22 everything that a retransmission 23 service does, from taking it in on 24 antennas, processing it, having the 25 website where people order it up</p>	<p>1 PROCEEDINGS 2 of it on my laptop would not be a 3 public performance?</p> <p>4 MR. SMITH: The use of a 5 Slingbox may or may not involve 6 some copyright infringement. It 7 would not be a public performance, 8 that's correct.</p> <p>9 JUDGE GLEESON: The potential 10 audience is just me.</p> <p>11 MR. SMITH: That's correct.</p> <p>12 JUDGE GLEESON: Your argument 13 I don't think takes sufficient 14 account of the fact that 15 Cablevision is part of the 16 landscape. And once you take that 17 kind of Slingbox phenomenon and 18 then push it back upstream and have 19 it be provided, here by Aereo, in 20 just the same way that Cablevision 21 provided the DVD function, it sure 22 looks like you've got a problem 23 with the Cablevision case.</p> <p>24 MR. SMITH: But again, your 25 Honor, even before, before you get</p>

4 (Pages 10 to 13)

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HEARING - 11/30/2012

Page 14	Page 16
<p>1 PROCEEDINGS 2 to the creation of the copy and the 3 sending it out over the internet, 4 there is a lot of things that 5 Aereo's already done, including 6 transmissions inside its own 7 facility to get the thing to the 8 server where it's converted into 9 internet format. 10 And all of those things exist 11 separate and apart from any copy 12 that is made, and are not 13 individualized in the same way, 14 there is no preceding copy.</p> <p>15 JUDGE GLEESON: But before it 16 goes to one of its subscribers, is 17 an individualized copy made with a 18 separate hard drive allocable to 19 that subscriber?</p> <p>20 MR. SMITH: That's correct, 21 yes.</p> <p>22 And the legal question is 23 whether you're going to read that 24 in light of the statute. The 25 statute, after all, makes it</p>	<p>1 PROCEEDINGS 2 factual situations entirely 3 different from the one before the 4 court. 5 As the fly on the wall put it, 6 it's actually inadequate, the 7 precedent has to be viewed in light 8 of the facts before the panel. 9 Otherwise you say well, you have to 10 follow the law. But the law here 11 is a statute. And Congress could 12 not have been more clear that it 13 intended not to allow people to 14 engage in retransmission businesses 15 of this kind. 16 Now, they didn't anticipate 17 specific individual copies because 18 this was 1976, but they did say 19 whether it's live or time delayed, 20 it doesn't matter whether it's 21 individual streams, it doesn't 22 matter whether it goes at the same 23 time or different times, same 24 places, different places, any 25 device or process, legislative</p>
Page 15	Page 17
<p>1 PROCEEDINGS 2 perfectly clear that Congress 3 intended to cover this --</p> <p>4 JUDGE GLEESON: I get your 5 argument.</p> <p>6 Can we do this consistent with 7 Cablevision?</p> <p>8 MR. SMITH: I think this is an 9 important element of how far 10 decisus works. If you have a 11 statutory interpretation by a prior 12 panel that includes some language 13 that covers lots of different other 14 factual situations, that when you 15 get to those other factual 16 situations, and it's perfectly 17 evident that to apply that broad 18 language to those situations you 19 would be acting inconsistent with 20 the statute, then that broad 21 language becomes dictum to the 22 extent it applies to these other 23 fact situations.</p> <p>24 I don't think a panel can bind 25 subsequent panels with respect to</p>	<p>1 PROCEEDINGS 2 history says we're trying to be as 3 absolutely broad as we can because 4 of the kinds of technological 5 advances that are coming, we still 6 want retransmission has to be 7 something that you need to pay for. 8 Because you're profiteering on 9 somebody else's property. 10 So if this panel says we are 11 bound by this language that was 12 applied to a completely different 13 fact situation, then what you're 14 doing is you're following, I would 15 submit, is dictum, to the extent 16 that that broad language is applied 17 here in this context, you're 18 feeling as if you're bound by 19 something that that panel did not 20 have the authority to bind you on, 21 because they did not have these 22 facts before them at that time. 23 JUDGE CHIN: You have some 24 rebuttal time. We'll hear from 25 your colleague, Mr. Keller.</p>

5 (Pages 14 to 17)

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<p style="text-align: right;">Page 18</p> <p>1 PROCEEDINGS 2 MR. SMITH: I appreciate it, 3 your Honor. Thank you. 4 MR. KELLER: May it please the 5 court, I'm Bruce Keller, I 6 represent the ABC parties in 2807. 7 I have three points to make 8 that I hope you'll find complement 9 those made by Mr. Smith. The first 10 is about the Transmit Clause, it's 11 foundational in nature. The second 12 is about Cablevision, it's 13 interpretive, I think those are 14 some of the questions Judge Gleeson 15 was asking. And the third is about 16 Aereo, and it's based on the 17 record. 18 The Transmit Clause point is 19 really this: When Congress enacted 20 the Transmit Clause it was 21 declaring to businesses that 22 publicly performed copyrighted 23 works are infringing, and if they 24 make their customers capable of 25 receiving transmissions or</p>	<p style="text-align: right;">Page 20</p> <p>1 PROCEEDINGS 2 do for themselves, that's not a 3 performance. Congress said it is a 4 performance and if you do it for 5 all of your paying subscribers, 6 that's a public performance. 7 In other words, the stand in 8 the shoes of the consumer defense 9 was rejected through the new 10 Transmit Clause, that's what 11 Kirkwood/Infinity Broadcasting so 12 holds at pages 108 and 112. 13 The second point is that 14 Cablevision did not change that 15 Transmit Clause jurisprudence. 16 And here's why: The Cablevision 17 panel concluded that the RSDVR 18 service before it was a storage 19 service, not a retransmission 20 service. It was not a 21 retransmission of performances. 22 And that's why the unique 23 copies that they found meaningful 24 there don't make a difference here. 25 In that remote storage DVR case,</p>
<p style="text-align: right;">Page 19</p> <p>1 PROCEEDINGS 2 retransmissions of copyrighted 3 performances, regardless of the 4 technology, that business is being 5 outlawed. 6 And at the core of the 7 Transmit Clause are services that 8 retransmit over-the-air radio or 9 television broadcasts. Every case 10 that has addressed a retransmission 11 of either a radio or television 12 broadcast has concluded it's a 13 violation of the Transmit Clause. 14 Legislative history is clear on 15 that, the Kirkwood case, the 16 FineTime 24 case from this circuit 17 is clear on that. 18 And to make sure that 19 retransmitters are swept up within 20 the Transmit Clause, Congress 21 instructed courts to reject the 22 1960s era defense that if all we do 23 is enable someone who otherwise 24 could receive that performance, if 25 we just facilitate what they could</p>	<p style="text-align: right;">Page 21</p> <p>1 PROCEEDINGS 2 you could not, for example, watch 3 the Super Bowl -- 4 JUDGE CHIN: There is a 5 storage aspect to the Aereo system? 6 MR. KELLER: There is a 7 storage aspect to the Aereo system, 8 it is one that they downplay to the 9 virtual exclusion of their 10 retransmission service. 11 And it is absolutely clear 12 from their own advertising and from 13 the record that they enable their 14 subscribers to watch the Super Bowl 15 as it is broadcast. 16 JUDGE GLEESON: But even in 17 the watch mode they can stop, they 18 can pause, rewind. Correct? 19 MR. KELLER: Yes, that is 20 true. 21 But the Transmit Clause says 22 it doesn't matter when a 23 subscriber, how a user watches a 24 program, we're concerned with 25 whether a retransmitter is</p>

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<p>1 PROCEEDINGS 2 retransmitting that program. 3 And the difference between 4 Cablevision and Aero in this 5 regard is crisp. You could not 6 watch the Super Bowl in real-time 7 as a retransmission of a 8 copyrighted performance through the 9 RSDVR service.</p> <p>10 JUDGE GLEESON: How about my 11 Slingbox example, they can, and 12 that's not a public performance, 13 right?</p> <p>14 MR. KELLER: So I took your 15 point about the private nature of 16 Slingbox. I think Mr. Smith made 17 clear it's not been tested yet, 18 there is no precedent, there is no 19 court ruling on it.</p> <p>20 JUDGE GLEESON: It's hard to 21 figure why any precedent would be 22 construed in such a way to render 23 that a public performance.</p> <p>24 MR. KELLER: I'm not arguing 25 whether it is or it isn't.</p>	<p>1 PROCEEDINGS 2 opinion -- 3 JUDGE CHIN: With a Slingbox 4 you're getting a transmission in 5 some other way, not through -- 6 MR. KELLER: Not through the 7 system. 8 So what drove the Second 9 Circuit in Cablevision was this 10 notion that the RSDVR service was a 11 storage service. That led directly 12 to the analogy of the VCR in your 13 home moved upstream. 14 And the Second Circuit 15 concluded that because it was not a 16 retransmission service, it was not 17 a public performance at the point 18 at which you played back what you 19 previously had.</p> <p>20 JUDGE DRONEY: So in the Aero 21 system, if you hit pause on the 22 watch mode for five seconds, is it 23 still a public performance after 24 that or is that a unique copy after 25 you do that?</p>
<p>1 PROCEEDINGS 2 I think the bigger point is 3 under the Second Circuit precedent, 4 Kirkwood matters. Kirkwood says 5 that what a consumer might be able 6 to do on his or her own with a 7 piece of equipment is one thing. 8 Cablevision basically says the same 9 thing when it uses the VCR analogy 10 as the analogy that governs the 11 day. 12 It's another thing when a 13 third party commercial service 14 insinuates itself into the process, 15 they don't get to stand in the 16 shoes of what you could do if you 17 could afford the Slingbox.</p> <p>18 JUDGE CHIN: How is the Aero 19 system different from the Slingbox 20 system as a factual matter?</p> <p>21 MR. KELLER: I think that the 22 difference between the Aero system 23 is that it is a full-fledged 24 service. There are a number of 25 findings in the District Court's</p>	<p>1 PROCEEDINGS 2 MR. KELLER: The unique copies 3 don't matter here when the system 4 enables the subscribers to watch 5 it. 6 JUDGE DRONEY: It's a private 7 performance then. If you are in a 8 watch mode, you pause it for five 9 seconds and resume watching, does 10 that now become a private 11 performance? 12 MR. KELLER: No. Because -- 13 and Congress, this gets to the 14 point earlier, Congress 15 contemplated technological devices 16 evolving over time. They said, 17 doesn't matter how you do it. Any 18 device or process that facilitates 19 the retransmission is going to be 20 swept up in the Transmit Clause. 21 And then went further. It 22 said not only that, you could 23 retransmit at different times, same 24 time, different places, same 25 places, all of it is embraced. The</p>

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<p style="text-align: right;">Page 26</p> <p>1 PROCEEDINGS 2 eye is on the retransmission 3 service and what it does in terms 4 of retransmitting the initial 5 copyrighted performance. 6 And the difference between the 7 Cablevision decision and this case 8 is the difference between storage 9 and retransmission. 10 And how do we know that, we 11 know that from what the Second 12 Circuit subsequently said in the 13 ASCAP case. Because in ASCAP they 14 drew the same distinction between a 15 musical file download, a stored 16 copy of something that was sent on 17 but not in any way that could 18 possibly be perceived, according to 19 the ASCAP panel, as a performance, 20 in a stream. Which they said could 21 very well be a performance. 22 But Cablevision went further, 23 and this is really crucial. Not 24 only did it distinguish between 25 storage and retransmission, it said</p>	<p style="text-align: right;">Page 28</p> <p>1 PROCEEDINGS 2 their decision. They said a 3 different delivery system design 4 may well result in a different 5 analysis of whether there is a 6 public performance. 7 So they started with the VCR 8 analogy because it was a storage 9 system. They didn't exculpate all 10 retransmission services because 11 they used unique copies, and they 12 warn that different designs may 13 matter. And here you have a very 14 different design. 15 Which takes me through the 16 third point about Aereo and the 17 record. 18 Aereo is at the heart of the 19 Transmit Clause because they admit 20 that they are a retransmission 21 service. Super Bowl comes in, 22 Super Bowl goes out, all within 23 seconds. They advertise themselves 24 as a service that you can use to 25 watch television without cable. No</p>
<p style="text-align: right;">Page 27</p> <p>1 PROCEEDINGS 2 we are not going to lay down a rule 3 that all unique copies always 4 render something a private 5 performance. 6 They did it at least three 7 places in the opinion. The first 8 was saying that copies may be 9 relevant to whether or not 10 something's a private performance, 11 based on whether they truly play an 12 audience-limiting function. 13 Then they said, and another 14 thing, not only is it just relevant 15 and not determinative, they 16 qualified that statement in the 17 very next paragraph when they said, 18 and by the way, we're not analyzing 19 the concept of to the public for 20 all purposes, we are not analyzing 21 the contours of to the public in 22 any great detail. 23 And then it went on on the 24 very next page to say even more 25 about how cabined they were making</p>	<p style="text-align: right;">Page 29</p> <p>1 PROCEEDINGS 2 cable required. Broadcast TV is 3 right on its home page. 4 That's at pages 15 -- well, 5 page 55 of the record, and 6 Mr. Kanojo said it on the stand at 7 pages 1570 to 71 of the record. 8 And it's in its very 9 positioning statement. Aerco is a 10 retransmission statement by its own 11 design. And because it doesn't 12 break the retransmission chain, 13 which the Second Circuit found was 14 broken in Cablevision because of 15 the act of storage, and then the 16 subsequent act, private playback, 17 on those facts Aereo does not get 18 the benefit of the Cablevision 19 analysis. 20 I reserve some time. 21 JUDGE CHIN: Yes. 22 MR. KELLER: Thank you very 23 much. 24 MR. HOSP: Your Honors, David 25 Hosp for Aereo.</p>

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<p>1 PROCEEDINGS 2 May it please the court, I 3 will respond to a number of the 4 comments that have been made by 5 both attorneys for plaintiffs. 6 But first, I'd like to make 7 five basic points with respect to 8 this case. First, I think you 9 heard this from opposing counsel, 10 consumers have the right to make 11 private performances. They have 12 the right to use an antenna, they 13 have the right to use a DVR, and 14 they have the right to use a 15 Slingbox type system, an internet 16 connection that allows them to make 17 private performances. 18 Second, supplying the 19 technology to accomplish this does 20 not constitute a violation of the 21 private performance right. And 22 particularly it does not constitute 23 a direct infringement of any 24 copyright. And that is the only 25 thing that has been challenged</p>	<p>1 PROCEEDINGS 2 Judge Nathan in her decision was 3 very clear that in fact a consumer 4 makes the copy. She said, whether 5 a user watches a program through 6 Aereo's service as it is being 7 broadcast or after the initial 8 broadcast ends, does not change 9 that the transmission is made from 10 a unique copy previously created by 11 that user, accessible and 12 transmitted only to that user. 13 JUDGE CHIN: Only the prior 14 creation of that copy, the consumer 15 got it from Aereo. True? 16 MR. HOSP: Yes. The consumer 17 accessed it through the antenna 18 that Aereo provided. 19 JUDGE CHIN: It seems to me in 20 Cablevision, there was an ongoing 21 relationship between the consumer 22 and Cablevision. The consumer was 23 receiving the broadcast through 24 Cablevision. Cablevision as a 25 cable provider had the right to do</p>
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<p>1 PROCEEDINGS 2 here, is a direct infringement -- 3 JUDGE CHIN: Do you concede 4 that Aereo is transmitting? 5 MR. HOSP: Consumers in the 6 Aereo system transmit a copy of -- 7 JUDGE CHIN: My question is, 8 do you concede that Aereo is 9 retransmitting -- that Aereo 10 captures broadcasts and then 11 retransmits them? 12 MR. HOSP: No, your Honor. 13 Aereo transmits a copy that 14 has been made by the consumer. 15 That's what's done using the Aereo 16 system. And that is, it's a 17 significant difference. 18 I take your Honor back to the 19 ASCAP decision -- 20 JUDGE CHIN: How does the 21 consumer -- are you suggesting the 22 consumer is making the copy on her 23 own, or is it doing with it with 24 the assistance of Aereo? 25 MR. HOSP: Well, your Honor,</p>	<p>1 PROCEEDINGS 2 that. And then the consumer is 3 making a copy. Instead of doing it 4 in his living room, he's doing it 5 through machinery at Cablevision. 6 Here there is no ongoing 7 relationship or prior relationship 8 with Aereo. And it's that first 9 capturing of the broadcasting that 10 results in the consumer having it. 11 So why doesn't that make this 12 case different from Cablevision? 13 MR. HOSP: It doesn't because 14 the Cablevision court specifically 15 addressed that issue. In fact, it 16 was an issue that was raised by the 17 plaintiffs in that case. 18 What the plaintiffs said was, 19 in fact they argued to this court, 20 the transmission, where Cablevision 21 split the stream and directed that 22 stream into the RSDVR system, the 23 plaintiffs themselves said that's 24 unlicensed, that's completely out 25 of bounds, nothing that they do</p>

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<p>1 PROCEEDINGS 2 within the RSDVR system is licensed 3 at all. 4 And this court accepted that. 5 It accepted them at their word, and 6 they said -- 7 JUDGE CHIN: But the 8 plaintiffs were unsuccessful on 9 that point. 10 But before it got to the point 11 where they were separating the 12 stream, there was a license for 13 that. And doesn't that make this 14 case different? 15 MR. HOSP: Your Honor, it 16 doesn't make this case different 17 because the transmission that this 18 court considered in Cablevision was 19 the transmission from the 20 individual copy to the individual. 21 And basically what Cablevision said 22 was, the court accepted the 23 plaintiffs' argument that in fact 24 the transmission, the splitting of 25 the stream that went into the RSDVR</p>	<p>1 PROCEEDINGS 2 their watch function. And none of 3 them has paused it. 4 Aren't those 5,000 people 5 seeing the exact same thing at the 6 exact same time? 7 MR. HOSP: They are not, 8 actually. And this was a finding 9 that the court made. 10 In fact, what happens in the 11 Aereo system is a consumer logs on, 12 they are assigned an antenna. And 13 that individual antenna receives 14 its own individual signal. 15 And what was shown at the 16 hearing was in fact the signals 17 that are generated in each 18 individual's antenna are different. 19 There was actual, an actual factual 20 determination, there was evidence 21 that showed that in fact antenna A 22 is generating a slightly different 23 signal from antenna B. 24 JUDGE DRONEY: How is it 25 different?</p>
<p>1 PROCEEDINGS 2 system, was not licensed. 3 And what Cablevision said was, 4 you know what, that doesn't matter. 5 It doesn't matter whether or not 6 that stream is licensed or not, 7 because ultimately the only thing 8 that we're looking at is the nature 9 of the transmission itself. 10 And the transmission at issue, 11 and this is the fundamental holding 12 of Cablevision, but not just 13 Cablevision, it's the fundamental 14 holding, it's one of the 15 fundamental holdings of ASCAP too. 16 It is that a transmission from an 17 individual copy to a single 18 individual is not a public 19 performance. 20 JUDGE DRONEY: Let's talk 21 about the individualization of 22 this. Let's hypothetically say 23 Monday Night Football, 24 Giants/Redskins, next Monday, 5,000 25 Aereo customers are watching it on</p>	<p>1 PROCEEDINGS 2 JUDGE GLEESON: Redskins might 3 win in some homes but lose in 4 others? 5 MR. HOSP: They might. It 6 might be broadcast differently down 7 in Washington. 8 No, what was the difference 9 is, again, they're not differences 10 that make a significant impact on 11 the perception and what you are 12 actually sort of seeing. 13 JUDGE DRONEY: People have 14 different quality TVs too. How is 15 what they're watching different? 16 If they're just on their watch 17 function, they haven't paused it, 18 aren't they seeing the same 3rd 19 down and 3 play at the same time as 20 the 4,000 other customers? 21 MR. HOSP: Again, they may be 22 viewing it at the same time. 23 But under Cablevision and 24 under ASCAP what they are viewing, 25 what is being transmitted to them</p>
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<p>1 PROCEEDINGS 2 is different from what is being 3 transmitted to others. 4 JUDGE CHIN: You're saying 5 that's an individualized copy? 6 MR. HOSP: Yes, exactly. 7 It is both an individual -- -- 8 JUDGE CHIN: Does that make 9 any sense? Millions of people are 10 watching the football game, they 11 get it through Aereo, and put aside 12 the record function, and that's not 13 getting a retransmission from 14 Aereo? That's the position? 15 MR. HOSP: Under the Transmit 16 Clause, and under particularly -- 17 JUDGE CHIN: But as a matter 18 of common sense. Is it at all 19 logical that, you know, the 25,000 20 people who are watching it 21 individually on their, through 22 their Aereo system, that they are 23 watching an individualized copy and 24 they're not watching the football 25 game?</p>	<p>1 PROCEEDINGS 2 would be consistent with the 3 Copyright Act because it's still a 4 copy. Is that the position? 5 MR. HOSP: Your Honor, just to 6 clarify your hypothetical. 7 Are you saying that there is 8 still a fixed copy that is 9 cognizable? 10 JUDGE CHIN: Exact same 11 technology, except that the 12 consumer, the Aereo subscriber does 13 not have the option of hitting a 14 record button. All he can do is 15 watch. 16 MR. HOSP: That would be a 17 very, very different situation. 18 Because there -- and again, the 19 real question, under Cablevision 20 and ASCAP is whether or not a fixed 21 copy is made. Which is different 22 from a streaming situation. 23 JUDGE CHIN: The exact same 24 technology except you're not giving 25 the option of letting the person</p>
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<p>1 PROCEEDINGS 2 MR. HOSP: It is logical based 3 on the system that Congress put in 4 place. 5 This all goes back to the 6 Transmit Clause, and what the 7 Transmit Clause says is, that the 8 performance at issue -- 9 JUDGE CHIN: What if you took 10 away the record function 11 completely, and this were just a 12 system for streaming and watching. 13 Like I view. Is that -- and that's 14 perfectly fine? 15 MR. HOSP: No, no. If you're 16 talking about a streaming service 17 where there is no fixed copy that's 18 being made, then no, that is a 19 public performance issue. 20 You could see this distinction 21 with respect to -- 22 JUDGE CHIN: But if you take 23 away the record function, instead 24 of two buttons your only choice is 25 to watch, you're saying it still</p>	<p>1 PROCEEDINGS 2 record it. Otherwise the 3 technology is the same, in terms of 4 the copying, et cetera, that's all 5 the say. 6 Would that violate the 7 Copyright Act? 8 MR. HOSP: If there was -- 9 again, if there is a fixed copy 10 being made, then no, it would not. 11 Under Cablevision, under my 12 reading of Cablevision, again, you 13 don't need to reach that question 14 because that's not the question 15 that's presented in this case. 16 But under my reading of 17 Cablevision, what Cablevision says 18 is where you have a unique fixed 19 copy, you now have a reproduction 20 issue. But it's no longer a public 21 performance issue. 22 And again, coming back to 23 ASCAP, think about it, you're 24 sitting at your computer and you 25 want to listen to a song, you want</p>

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<p>1 PROCEEDINGS 2 to listen to a song right now. 3 You've got two ways to do it. You 4 can stream it, and if you stream it 5 what's happening is you are 6 actually streaming it from a common 7 copy that other people have access 8 to. And that's a public 9 performance issue. It's not a 10 reproduction issue, because there 11 is no fixed copy that's being made.</p> <p>12 The other way you can listen 13 to music right now is to download 14 it. And what you do is you 15 download it, it takes a couple of 16 seconds, there is a couple of 17 seconds delay, and then when you 18 play that, again, within a couple 19 of seconds, what you are playing is 20 an individual copy.</p> <p>21 And that's the circumstance 22 that ASCAP, this court examined in 23 ASCAP. What this court said was, 24 you know what, that's not a public 25 performance. It doesn't matter,</p>	<p>1 PROCEEDINGS 2 stands in the Second Circuit, that 3 is, if that individual copy is 4 going directly to only one 5 individual and is only accessed by 6 that individual, what you have is a 7 copy issue.</p> <p>8 JUDGE GLEESON: But if it was 9 just one retransmission, you 10 wouldn't win; right?</p> <p>11 MR. HOSP: If it was --</p> <p>12 JUDGE GLEESON: If you had no 13 individual antennas, no 14 individualized copies, you'd lose?</p> <p>15 MR. HOSP: Yes. If it was one 16 antenna and no copies being made, 17 at that point you --</p> <p>18 JUDGE GLEESON: Does the 19 provider of Video-on-Demand content 20 create a public performance when it 21 provides a movie to someone in 22 Video-on-Demand?</p> <p>23 MR. HOSP: Yes, absolutely.</p> <p>24 And that's exactly the same 25 situation that the court, the</p>
<p>1 PROCEEDINGS 2 because now you've got a copy 3 issue. You've got a reproduction 4 right issue. These are two rights 5 that work in tandem with each 6 other.</p> <p>7 JUDGE DRONEY: Let me ask you 8 about the antennas.</p> <p>9 Would you still be arguing 10 that these are not public 11 performances if instead of all 12 these antennas you just had one? 13 Is the system, without that 14 feature, still not a public 15 performance?</p> <p>16 MR. HOSP: Well, again, it's a 17 very different case than what we 18 have here. And we do believe that 19 the antennas matter in this case.</p> <p>20 But under the holding in 21 Cablevision, where you're talking 22 about a system like this, where 23 there is an individual copy that is 24 being made, under the ruling in 25 Cablevision, under the law as it</p>	<p>1 PROCEEDINGS 2 Cablevision court addressed when it 3 talked about the on-command in the 4 Redhorn cases.</p> <p>5 JUDGE GLEESON: Would it be 6 different if a provider of 7 Video-on-Demand created an 8 individualized hard drive for each 9 of the subscribers, would they then 10 be creating a private performance 11 and not have to worry about paying 12 royalties?</p> <p>13 MR. HOSP: That's exactly what 14 ASCAP is. And what ASCAP held was 15 in that situation where what you 16 have is somebody making an 17 individual copy, what you have is a 18 reproduction right issue. But it's 19 not a public performance right 20 issue.</p> <p>21 That is exactly the issue that 22 was decided by this court in ASCAP 23 when it said, you know what, these 24 are two rights that function in a 25 complementary way. And Cablevision</p>

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<p>1 PROCEEDINGS 2 recognized that. Cablevision 3 recognized the notion that it was 4 okay that by creating a copy you no 5 longer had a public performance 6 issue, because you now were 7 creating -- you essentially were 8 picking your poison. You were 9 creating a reproduction right 10 issue. 11 And what Cablevision says is, 12 that's okay because you have 13 another right to go under. 14 Now, in this particular case, 15 because of the Supreme Court's 16 decision in Sony, we believe that 17 the consumer making the copy is a 18 fair use. And therefore while it 19 does implicate the reproduction 20 right, we believe that it is not a 21 violation of that reproduction 22 right, because it's foreclosed 23 under Sony. 24 But that's an issue that's 25 being litigated in the District</p>	<p>1 PROCEEDINGS 2 number of different reasons. 3 JUDGE DRONEY: Is there any 4 technological reason for it? 5 MR. HOSP: There is. 6 Is there a technological 7 reason in terms of? 8 JUDGE DRONEY: Does it make 9 the transmissions better? Why do 10 it, why do you spend all the money 11 on all these little antennas when 12 you can do it with one big antenna? 13 MR. HOSP: It makes it clear 14 that there are in fact two bases 15 for this being legal under the 16 Copyright Act. I mean, that's what 17 Judge Nathan made clear, was that 18 the copies themselves, under the 19 law as it is -- 20 JUDGE CHIN: But it seems 21 you're exalting form over 22 substance. You're going through 23 this fiction of using, you know, a 24 million itty-bitty antennas when 25 really you'd rather do it with one,</p>
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<p>1 PROCEEDINGS 2 Court. 3 JUDGE DRONEY: Can I get back 4 to my antenna question. 5 It sounded like you said even 6 with one antenna you'd still be 7 arguing the same position under 8 Cablevision that the individualized 9 copies here do not constitute a 10 public performance. That's what 11 you said, right? 12 MR. HOSP: Your Honor, if we 13 were presented with that, it's my 14 reading of Cablevision that because 15 there is an individual copy, that 16 it would foreclose a public 17 performance finding there. 18 JUDGE DRONEY: Even with just 19 one antenna? 20 MR. HOSP: Even with just one 21 antenna. But again, that is not 22 our situation. 23 JUDGE DRONEY: So why did you 24 build all these antennas? 25 MR. HOSP: Well, there are a</p>	<p>1 PROCEEDINGS 2 just to try to fit within 3 Cablevision. 4 Isn't that what's happening? 5 MR. HOSP: No, your Honor. 6 JUDGE CHIN: No? Is there any 7 legitimate business reason for 8 having all of these little 9 itty-bitty antennas? 10 MR. HOSP: I guess I'm not -- 11 JUDGE CHIN: Any technological 12 reason. 13 MR. HOSP: Is there any 14 logical reason? 15 JUDGE CHIN: Technological 16 reason. 17 MR. HOSP: Technological 18 reason. 19 The reason for having the 20 antennas is to comply with the 21 Copyright Act. And we believe that 22 in both instances it complies with 23 the Copyright Act. 24 And again, this is something, 25 the argument that plaintiffs have</p>

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<p>1 PROCEEDINGS 2 made that the court, the District 3 Court paid too much attention to 4 the form of -- 5 JUDGE CHIN: Let's extend this 6 to books. You send an electronic 7 book to a consumer, you make it a 8 little bit different, you put the 9 purchaser's name on it. Does that 10 now suddenly become a private 11 performance? 12 MR. HOSP: Well, again -- 13 JUDGE CHIN: Under the logic 14 that you're advocating in this 15 case? 16 MR. HOSP: Again, with respect 17 to books, the public performance 18 right obviously doesn't apply. 19 But taking your argument for 20 what I think that you're asking, 21 the answer is yes, this, for 22 example, all comes back to ASCAP. 23 If you basically take it in the 24 music industry situation, yes, what 25 this court held was that where you</p>	<p>1 PROCEEDINGS 2 if you turn it around and you say 3 okay, let's accept, for example, 4 these aggregation arguments. What 5 you're saying is every time 6 somebody goes up on a roof and puts 7 an antenna on a roof and then 8 transmits that signal down to their 9 own television, that's now a public 10 performance because that has to be 11 aggregated with the original 12 broadcaster's performance. 13 Every single question that is 14 raised by the plaintiffs was 15 actually specifically addressed in 16 the Cablevision decision. 17 JUDGE CHIN: But that's not 18 what's happening here. Aereo is 19 providing the service so the 20 consumer doesn't have to go up on 21 the roof. And the consumer can 22 stay downstairs. 23 Why isn't that retransmission? 24 MR. HOSP: Because the 25 analysis is the same under the</p>
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<p>1 PROCEEDINGS 2 make a copy, even if you're 3 listening to it right away, where 4 you make a copy, it's not a public 5 performance anymore. And that's 6 important because you do have 7 another right to go under. 8 And in fact, when you read the 9 Cablevision decision, at the end of 10 the Cablevision decision, the end 11 of the Cablevision decision makes 12 clear that this court understood 13 exactly what it was doing. This 14 court said, you know what, we're 15 not saying that there is no 16 copyright protection here, we're 17 not saying that there aren't 18 possibilities in many instances 19 where you're not going to have a 20 right either under indirect 21 infringement or potentially under 22 your reproduction right. And 23 that's okay. 24 And it's important to do that 25 because if you take the flip side,</p>	<p>1 PROCEEDINGS 2 Copyright Act in either instance. 3 What the Copyright Act held is -- 4 what the Copyright Act says, what 5 Congress intended, was for the 6 analysis to be the transmission of 7 the performance, rather than the 8 transmission of the work. 9 And again, this is really what 10 plaintiffs are asking you to do, is 11 overturn Cablevision. That's 12 what's at issue. And what's being 13 said here is that Cablevision is 14 wrong. We disagree with 15 Cablevision. 16 JUDGE CHIN: I think the 17 District Judge got it right in 18 Cablevision. But of course we're 19 bound by the Circuit decision. 20 MR. HOSP: And that really is 21 what's, you know, in this instance 22 it's the sort of thing where -- 23 JUDGE GLEESON: And to put 24 your position as just as bluntly, 25 you seem to be reticent to say it</p>

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<p>1 PROCEEDINGS 2 out loud, the model is built around 3 Cablevision? 4 MR. HOSP: Yes. 5 JUDGE GLEESON: You don't have 6 all these little antennas because 7 it makes any sense, it's kind of 8 like constructing your business 9 affairs to avoid taxes. Right? 10 It's tax avoidance is different 11 from tax evasion. 12 But you built this business 13 and the technology with Cablevision 14 in mind to avoid copyright 15 violations; correct? 16 MR. HOSP: Everyone in this 17 case agrees that Aero designed 18 this system to comply with 19 copyright and to follow the law as 20 this court laid down in 21 Cablevision. 22 Now, the plaintiffs -- 23 JUDGE GLEESON: And the reason 24 you have all the little tiny 25 antennas is simple, it's because,</p>	<p>1 PROCEEDINGS 2 JUDGE CHIN: Is it your view 3 that this case is exactly like 4 Cablevision? 5 MR. HOSP: Well, the District 6 Court -- 7 JUDGE CHIN: Even though there 8 isn't that ongoing relationship 9 between the subscriber and Aero as 10 there was in Cablevision? 11 MR. HOSP: Well, your Honor, I 12 believe there is an ongoing 13 relationship. 14 But the District Court made 15 factual determinations that in fact 16 all of the facts that are relevant 17 to the Cablevision finding are 18 present here. The District Court 19 made those factual findings 20 specifically. And those factual 21 findings have not been challenged. 22 JUDGE CHIN: You don't think 23 you're asking us to go one step 24 further than Cablevision with this 25 case?</p>
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<p>1 PROCEEDINGS 2 in your view, kind of a belt and 3 suspenders approach to avoiding the 4 public performance? 5 MR. HOSP: And it follows the 6 law and it follows the Copyright 7 Act. 8 Now, plaintiffs suggested 9 somehow this is a bad thing that 10 Cablevision -- that Aero has 11 decided to follow the law. It's an 12 argument that doesn't make sense. 13 The law, this court decided 14 what the law was. And Aero 15 followed it to a T. And the law is 16 what it is. 17 This court -- let me make 18 clear, I believe that the Second 19 Circuit got it right in 20 Cablevision. Because it's the 21 balance between private performance 22 and public performance that 23 Congress indicated it wanted to 24 strike. 25 And so this is a situation --</p>	<p>1 PROCEEDINGS 2 MR. HOSP: No, no. This 3 doesn't extend Cablevision at all. 4 Not even a little bit. This case 5 is on all fours with Cablevision. 6 The question under Cablevision 7 and under ASCAP, it's not just 8 Cablevision, it's ASCAP as well, 9 and other courts have followed this 10 as well, it's whether or not there 11 is a single unique copy and who can 12 receive that copy. And that's what 13 the law says. And in fact that's 14 how the law stands. 15 This is why the court -- and 16 this is why the Supreme Court noted 17 that in instances like this where 18 you're dealing with new technology, 19 courts have to be very circumspect 20 about extending copyright. 21 We're not asking to extend 22 Cablevision. Plaintiffs are asking 23 to extend the Copyright Act. 24 Appellants here are asking you 25 fundamentally to change the law and</p>

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<p>1 PROCEEDINGS 2 to overturn Cablevision. To 3 overturn ASCAP. And in the process 4 to punish Aereo for following the 5 law. 6 We're asking you not to do 7 this. We're asking you to uphold 8 Judge Nathan's exceptionally well 9 written opinion. 10 Thank you, your Honor. 11 JUDGE CHIN: Thank you. 12 We'll hear rebuttal. 13 MR. SMITH: Your Honors, I 14 think it's telling that you saw 15 from Mr. Hosp's argument no effort 16 to explain why their service and 17 his particular features with the 18 little antennas and the individual 19 copies should be exempt under the 20 statute as written by Congress. 21 Congress made the statute as 22 broad as possible. It said the 23 function of retransmission by any 24 device or process, whether it goes 25 to different people, different</p>	<p>1 PROCEEDINGS 2 your Honor. 3 Another argument that was made 4 by the cable companies before the 5 '76 Act is we're not harming you, 6 we're simply getting your broadcast 7 to more people. And more people 8 seeing the commercials. Congress 9 disagreed with that determination 10 and said, if you're making money 11 off their broadcast programming 12 that they paid to create, you owe 13 them license fees. 14 What Aereo is saying is we 15 found a way to design around it 16 using stuff in a decision that is 17 about a different factual 18 situation. 19 The one point I want to make 20 is that the same thing is true with 21 respect to the record function. 22 The statute is clear that a 23 retransmission service that delays 24 is also covered and also requires a 25 license. So if Ivy, for example,</p>
<p>1 PROCEEDINGS 2 places, same time, same place, all 3 of that ought to be requiring a 4 license. 5 Instead what they did is they 6 designed a system by taking some 7 straight language out of the 8 Cablevision decision and said we 9 think we can exploit this. 10 But it makes no sense to think 11 that a decision about that one 12 little DVR function changed the 13 statute and that it binds 14 subsequent panels to say well, you 15 can do it this way when in fact, as 16 was brought out in the questioning, 17 they could have 5 million people 18 watching the same Monday Night 19 Football game live over their 20 internet devices without paying a 21 dime in license fees for it. 22 JUDGE GLEESON: Does this 23 enlarge the audience for the 24 content? 25 MR. SMITH: It might well.</p>	<p>1 PROCEEDINGS 2 decided to make a copy of Monday 3 Night Football and tell the 4 subscribers you can watch this copy 5 On Demand whenever you want to for 6 the next 36 hours, that would also 7 be covered by the Transmit Clause. 8 It says same time or different 9 times. 10 JUDGE DRONEY: As long as 11 they're watching the same copy 12 though, right? 13 MR. SMITH: That is a function 14 that clearly the Transmit Clause 15 covers in that situation. 16 Now, the only question then is 17 are you going to let Aereo, which 18 has provided this television to 19 them through the antennas and made 20 it available, suddenly say well, 21 we're just a VCR, we're just a DVR, 22 because we make individual copies 23 instead of doing what Ivy would be 24 doing, which is time delayed 25 retransmissions.</p>
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	Page 62		Page 64
1	PROCEEDINGS	1	PROCEEDINGS
2	I think the important point is	2	Patriots every time 21-17. It is
3	different times is the same as	3	exactly the same performance.
4	saying delayed times. Delayed	4	And the notion that somehow
5	retransmission is the same as the	5	it's encoded differently, the name
6	live retransmission.	6	on the book example, somehow that
7	Thank you, your Honor.	7	makes it private, that is not
8	JUDGE CHIN: Thank you.	8	common sensical at all. It is a
9	JUDGE GLEESON: Thank you.	9	retransmission service, pure and
10	MR. KELLER: We are not asking	10	simple.
11	you to overturn the Second	11	Now, Mr. Hosp suggested that
12	Circuit's decision in Cablevision	12	without a fixed copy, somehow the
13	notwithstanding the rulings of the	13	result is different. No, it's not.
14	lower court in that case.	14	Either way, Congress said you use
15	It is not the case that	15	any device or process, if the end
16	Aereo --	16	result is that the viewer gets the
17	JUDGE GLEESON: District	17	performance, it's a retransmission
18	judges like overturning the Second	18	of a public performance, that
19	Circuit.	19	violates the Copyright Act without
20	MR. KELLER: Mr. Hosp did not	20	a license.
21	answer the question directly, Judge	21	Now, why is that important?
22	Chin, when you asked him to concede	22	Because it's all about the
23	whether Aereo is retransmitting.	23	difference that clearly separates
24	But Aereo conceded it already, at	24	us today on ASCAP. ASCAP came out
25	page 28 of their brief. There they	25	the way it did because at page 74
	Page 63		Page 65
1	PROCEEDINGS	1	PROCEEDINGS
2	say that Aereo is transmitting our	2	of that opinion, Judge Walker wrote
3	copyrighted performances, they're	3	that a performance, if it's not a
4	just not doing it directly. It's	4	performance, it can't be a public
5	right at the top of page 28.	5	performance. That's the holding of
6	So what? A retransmission	6	ASCAP.
7	service, by definition, indirectly	7	And in that context, the
8	retransmits the copyrighted works	8	download of a previously stored
9	of the original broadcaster. That	9	musical file to somebody's cell
10	is what a cable television system	10	phone was viewed, just like we
11	does. It receives a signal, runs	11	argue Cablevision's RSDVR service
12	it through the cable head end,	12	should be viewed, was viewed by the
13	sends it to its subscribers.	13	panel, as a stored service. It was
14	Aereo is a retransmission	14	not perceptible at the time that
15	service in every sense of the word.	15	the original transmission was
16	Judge Nathan made specific findings	16	coming in. There was input, but no
17	on that point. She repeatedly	17	output.
18	talked about Aereo's system	18	And Aereo is not that. It is
19	transmitting our copyrighted	19	a pure input/output service.
20	broadcast to Aereo's subscribers.	20	Without a license, it violates the
21	And, Judge Droney, your point	21	public performance right that the
22	really was the one I wanted to make	22	broadcasters have because it sells
23	and never got to. I guarantee you	23	our broadcast, our performances, to
24	that when you watch Super Bowl XLVI	24	its own subscribers.
25	through Aereo, the Giants beat the	25	Thank you very much.

17 (Pages 62 to 65)

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1 PROCEEDINGS
2 JUDGE CHIN: Thank you.
3 We'll reserve decision.
4 (Time noted: 10:49 a.m.)
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1 PROCEEDINGS
2 C E R T I F I C A T E
3 STATE OF NEW YORK)
4 : ss,
5 COUNTY OF NEW YORK)
6 I, ERIC J. FINZ, a Shorthand
7 Reporter and Notary Public within and
8 for the State of New York, do hereby
9 certify that the foregoing proceedings
10 were taken before me on November 30,
11 2012;
12 That the within transcript is
13 a true record of said proceedings;
14 That I am not connected by
15 blood or marriage with any of the
16 parties herein nor interested directly
17 or indirectly in the matter in
18 controversy, nor am I in the employ of
19 the counsel.
20 IN WITNESS WHEREOF, I have
21 hereunto set my hand this ____ day of
22 _____, 2012.
23
24
25 ERIC J. FINZ

18 (Pages 66 to 67)

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VIA E-MAIL

January 18, 2013

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Re: WNET, et al, v. Aereo, Inc., No. 12-Civ. 1540-AJN (S.D.N. Y.) (Consolidated)

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This letter responds to ABC Plaintiffs' correspondence dated January 16, 2013, requesting a stay of discovery until May 15, 2013. ABC Plaintiffs' request should be recognized and rejected for the discovery game-playing it is.

This Court considered and rejected the possibility of a stay of discovery at the scheduling conference on September 21, 2012.¹ In the four months since then, Aereo has expended an enormous amount of time, effort, and financial and human resources complying with its discovery obligations and providing extensive and burdensome discovery productions to the Plaintiffs. As a result, Aereo has now nearly completed its document production, including the production of vast quantities of ESI. By contrast, Plaintiffs have refused to engage in any reasonable or good faith document production process, and the only documents produced by the ABC Plaintiffs since the Preliminary Injunction phase are copyright registrations. As a result, the burdens of discovery have fallen almost entirely on Aereo to date.

It is not surprising, then, that ABC Plaintiffs would favor a three-month stay of discovery at this point. A stay would give Plaintiffs three months to review and analyze Aereo's extensive document and data production at their leisure, allowing them a full opportunity to plan out their deposition and trial strategy. And because they have refused to produce documents, ABC Plaintiffs could advance their case secure in the knowledge that Aereo would be deprived of the same opportunity. A stay at this point would thus serve no purpose but to reward Plaintiffs' failure to meet their discovery obligations, and give them a significant tactical litigation advantage.

¹ To be clear, Aereo believed a stay was appropriate in September, before the parties began further fact discovery. Once the Court denied the motion for a stay, Aereo fully complied with its discovery obligations in order to move this case forward expeditiously to resolution. Now, Aereo, unlike plaintiffs, has borne the very substantial expense and burden of nearly completing its document production.

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Hon. Alison J. Nathan
January 18, 2013
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Moreover, there can be no question that, however the Second Circuit rules on this Court's preliminary injunction decision, this case will proceed. Plaintiffs moved only to enjoin transmissions of over-the-air broadcasts that are not "completely" time-shifted. Assuming the Second Circuit upholds this Court's denial of Plaintiffs' motion, Plaintiffs have already indicated that they will continue with their reproduction claims. If the panel were to inexplicably break from established Second Circuit precedent and overturn this Court's denial of Plaintiffs' preliminary injunction motion, the requested injunction would not impact consumers' ability to use Aereo to record programming and play it back to themselves at a later time. In either event, discovery will continue in this case.

Plaintiffs in these consolidated cases have treated discovery as a game. They have imposed upon Aereo unreasonable discovery demands—demands with which Aereo has substantially complied—while seeking to avoid any discovery on their part. Now that Aereo has nearly completed its productions, ABC Plaintiffs ask the Court to approve these tactics with a stay. Their request should be denied.

Very truly yours,

/s/ R. David Hosp

R. David Hosp
Principal

RDH/dzs

cc: All Counsel of Record

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VIA E-MAIL

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Re: WNET, et al, v. Aereo, Inc., No. 12-Civ. 1540-AJN (S.D.N. Y.) (Consolidated)

Dear Judge Nathan:

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This letter responds to WNET Plaintiffs' correspondence dated January 16, 2013, requesting an extension of the fact discovery deadline from February 22, until May 15, 2013. Aereo does not disagree that a fact discovery extension may be required (although Aereo wants the most expeditious resolution of these actions), but believes that the request is premature because very substantial issues with Plaintiffs' production remain pending. As seems a pattern, Plaintiffs have rushed to the Court—apparently in an attempt to gain some tactical advantage—when they knew that Aereo was nearing the point at which it would prepare a letter to the court and motion to compel regarding extraordinary discovery non-compliance by the Plaintiffs. The parties' real dispute is not about the discovery deadline, as Plaintiffs' letter would have the Court believe, but about Plaintiffs' utter failure to engage in good faith discovery. The need for any extension is not occasioned by any failure in Aereo's document production (which has been exhaustive), but by Plaintiffs' delays and refusal to provide clearly relevant production in accordance with their legal obligation. The appropriate length of an extension can only be determined after a resolution of the outstanding disputed issues.

WNET Plaintiffs' assertion that an extension is necessary because Aereo has delayed discovery is patently false. To the extent that the discovery deadline must be extended, it is because Plaintiffs have unreasonably delayed discovery responses, failed to resolve issues promptly or reasonably and refused to produce relevant and necessary documents. In addition, it is important to note that Plaintiffs failed to limit the nature of the discovery sought to what they described at the September 21, 2012 scheduling conference, thus dramatically (and unreasonably) increasing the discovery burdens on Aereo.

The current discovery schedule was adopted by the Court at the urging of WNET Plaintiffs (and over Aereo's objection) based on specific representations that Plaintiffs made regarding the limited scope of the discovery they intended to pursue. Indeed, as everyone recognized, Plaintiffs had already engaged in exhaustive discovery of Aereo and its technology during the Preliminary Injunction phase of this case. In fact, during the scheduling conference, WNET Plaintiffs responded to direct questioning by the Court regarding additional discovery the Plaintiffs would need by stating that discovery would likely be limited to: (1) access to an Aereo subscription; (2) two antenna boards; (3) information about how the "watch" function is accessed; (4) database information regarding the manner in which consumers have actually

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Hon. Alison J. Nathan
January 18, 2013
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used the Aereo system; and—possibly—(5) non-party minor discovery from investors and marketing firms.

Aereo learned soon after the scheduling conference that Plaintiffs' statements to the Court about "limited" discovery were highly misleading. On September 24, Plaintiffs served Aereo with a broad set of document requests that sought patently irrelevant documents, including among other things, documents "concerning designs or architectures considered but not adopted in designing or implementing the Aereo System; documents "concerning any actual, contemplated, considered, or proposed business or strategic plans for Aereo or the Aereo System"; and documents "concerning the value of Aereo, the Aereo business, the Aereo system, or the Aereo System technology." Read literally, Plaintiffs' document requests would require Aereo to review and potentially produce nearly every document in its possession.¹

Although the requests were facially unreasonable and entirely beyond what Plaintiffs had indicated they would seek, Aereo promptly responded to the requests, subject to objections. The company began by producing the categories of information that Plaintiffs had indicated to the Court they would seek from Aereo. Production on all of those topics was substantially completed by the end of October. The only information not produced immediately after Plaintiffs' requests were served was database information regarding consumer use of the Aereo system. With respect to that topic, Aereo conferred with Plaintiffs at the beginning of October to provide, voluntarily, a description of all database and server log information available in the Aereo system, and then sent a written description of the databases and logs on October 24, 2012 (30 days after Plaintiffs served their requests), so that Plaintiffs could identify categories of interest. Plaintiffs did not respond, so Aereo collected and produced voluminous amounts of data from applicable databases and servers.

In total, Aereo has reviewed well over 300,000 documents totaling millions of pages in addition to numerous caches of data, computer code, and other ESI. As a result of this extraordinary effort, Aereo's production is nearly complete, and Plaintiffs' claims that Aereo has "delayed" its production are unsupportable.

By contrast, Plaintiffs have expended most of their resources during this same time avoiding discovery and stonewalling Aereo's reasonable document requests.² In response to several requests for the most basic and clearly relevant documents, Plaintiffs initially issued blanket refusals to produce anything. By way of example only, Plaintiffs refused to produce any communications by their boards of directors concerning Aereo or the Aereo technology, as well as documents concerning their deployment of remote storage digital video recorder

¹ Plaintiffs contrast the literal number of their requests with the number of Aereo's. But, while Plaintiffs made fewer document requests in number, their scope is unreasonably broad and effectively encompass every document in Aereo.

² Indeed, Plaintiffs' primary efforts in connection with discovery seem to be to generate dozens of multipage letters either making aggressive demands for "immediate" production of various items and documents or, ironically, trying to justify how burdensome discovery is to their major network clients.

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technology—documents which are directly related to Plaintiffs' claims of harm. Such blanket refusals to produce anything in response to many requests going to the core issues of the case could not reasonably have been made in good faith, but instead appear to have been interposed for the purpose of forcing Aereo into protracted negotiation to get basic information. Indeed, Plaintiffs have dragged out the meet-and-confer process with respect to their refusals to produce documents for more than a month while asking for repeated extensions and providing incomplete responses. Plaintiffs were well aware that Aereo was nearly ready, after weeks of unsuccessful attempts to confer and resolve the issues with plaintiffs, to bring these issues to the Court. Knowing that they could postpone it no longer, Plaintiffs sent these letters to try to preempt Aereo's filing and further avoid discovery via an extension or a stay.

To date, Plaintiffs' productions remain woefully incomplete. For example, several Plaintiffs, including WNET, WPIX, and Univision, have not produced a single document since the Preliminary Injunction phase. During the current round of discovery, Fox and PBS have only produced a smattering of minimally useful documents, consisting solely of copyright registrations and television schedules. Not a single email or written communication has been produced by any of the WNET Plaintiffs since April 2012.³ Plaintiffs' dilatory tactics already forced Aereo to postpone eight 30(b)(6) depositions of the WNET Plaintiffs (as well as nine depositions of the ABC Plaintiffs) that were previously scheduled so they could be completed well within the Court's imposed discovery deadline.

An appropriate discovery extension should not be set until document discovery issues are resolved. If no agreement on these disputes is reached, Aereo will shortly be filing a letter with respect to these discovery issues that concern material at the very heart of this case. For these reasons, the Court should deny WNET Plaintiffs' request for a discovery extension until the outstanding discovery disputes are resolved.

Very truly yours,

/s/ R. David Hosp

R. David Hosp
Principal

RDH/dzs

cc: All Counsel of Record

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³ Aereo is making one last effort to get Plaintiffs to voluntarily comply with its obligations. If that last effort is unsuccessful, Aereo will, in a separate letter, provide the Court with detail regarding Plaintiffs' discovery failures. It is sufficient here to note that Aereo cannot conduct a reasonable defense in the face of Plaintiffs' wholesale refusal to produce relevant documents.